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No. ____

In The Supreme Court Of The United States

REGINALD WILKINSON, et al.,
Petitioners,

v.

CHARLES E. AUSTIN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where state prison officials decide to place a prisoner in a "super-maximum security" facility based on a predictive assessment of the security risk the prisoner presents, but prison regulations create a liberty interest for the prisoner in avoiding such placement, do procedures meeting the requirements specified in *Hewitt v. Helms*, 459 U.S. 460 (1983), satisfy the prisoner's due process rights?

LIST OF PARTIES

The Petitioners are current or former officials of the Ohio Department of Rehabilitation and Correction ("ODRC"):

Reginald Wilkinson, Stephen Huffman, Todd Ishee, Bruce Martin, Deborah Nixon-Hughes, Cheryl Jorgenson-Martinez, Manish B. Joshi, Patrick F. Biggs, Audrey Sandor Nietzel and Matthew Meyer (collectively "Ohio").

The Respondents are a class of prisoners who have been or may be housed in the Ohio State Penitentiary, Ohio's only supermaximum-security prison. The class representatives are:

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PETITION

Reginald Wilkinson, the Director of the Ohio Department of Rehabilitation and Correction ("ODRC"), and the other Petitioners, respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

This case involves three relevant opinions: *Austin v. Wilkinson*, 372 F.3d 346 (6th Cir. 2004), reproduced at App. 1a–35a; *Austin v. Wilkinson*, 189 F. Supp. 2d 719 (N.D. Ohio 2002) ("*Austin* I"), reproduced at App. 47a–121a; and *Austin v. Wilkinson*, 204 F. Supp. 2d 1024 (N.D. Ohio 2002) ("*Austin* II"), reproduced at App. 39a–46a.

JURISDICTIONAL STATEMENT

The judgment and opinion below were entered June 10, 2004. No rehearing petition was filed below. On August, 27, 2004, this Court extended the time to file this petition until October 8, 2004. Order Extending Time to File, No. 04A174. Petitioners invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case turns on the Fourteenth Amendment to the United States Constitution and former ODRC Policy 111–07.

The Fourteenth Amendment provides, in relevant part, that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case is about choosing the right tool for an inherently difficult, and increasingly common, job—determining which inmates must be isolated in a "super-maximum security" prison to reduce danger to all who live or work in a State's prisons. That sensitive task requires "[d]iagnoses, prediction, risk assessment, and identification of causal factors" that "often defy objective criteria." Chase Riveland, *Supermax Prisons: Overview and General Considerations* (Nat'l Inst. of Corrs. 1999), at 9. This already-difficult task is now even harder for prison officials, because no precedent from this Court definitively establishes what kind of process the Due Process Clause requires for these predictive placement decisions, and the circuits have split on this important question.

The Third, Eighth and D.C. Circuits have correctly adopted the due process framework that this Court established for predictive, multivariate decisions in *Hewitt v. Helms*, 459 U.S. 460 (1983); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); and *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). That model recognizes that the very nature of these predictive decisions makes them "singularly unsuited for 'proof' in any highly structured manner." *Hewitt*, 459 U.S. at 477 n.9. The model thus requires only "an informal, nonadversary evidentiary review" involving notice and some opportunity for affected person to present his views. *Id.* at 476.

By contrast, the decision below aligns the Sixth Circuit with the Ninth, and arguably the Second, in requiring a qualitatively different type of process, the type required for disciplinary hearings by *Wolff v. McDonnell*, 418 U.S. 539 (1974). Because *Wolff*-type process is designed for retrospective determination of specific facts (whether an

inmate violated prison rules), it requires very different procedures: detailed advance notice of specific charges, the right to call witnesses, and written findings stating the evidence and reasoning underlying the decision.

Ohio seeks review because the *Wolff* model simply does not work for predictive placement decisions like the supermax placement decisions at issue here. *Wolff* process makes sense where prison officials are punishing prisoners for past wrongdoing, but supermax placement is about safe and effective prison management, not punishment. "Wardens [] invoke this procedure as a *preventative* . . . measure." Riveland, *supra*, at 8–9 (emphasis added). Forcing States to provide *Wolff*-type procedures for predictive decisions about which prisoners present security risks simply will not work. Those procedures have the wrong focus. It is the correctional analog to looking at the rear view mirror instead of through the windshield—you have a very narrow field of view and it tells you nothing about what is ahead. That results in bad decisions that in turn impose significant potential harm on persons (*i.e.*, other prisoners) who, by definition, have no way to avoid it.

As the Plaintiffs' leadoff witness acknowledged: "Human rights concerns cut both ways . . . . We are concerned about the rights of inmates to be safe and free from assaults or being preyed upon by dangerous inmates." The decision below hinders Ohio's ability to address that harm. Ohio therefore brings this petition to regain its ability to provide a safer and more secure prison environment.

STATEMENT OF THE CASE

Three sets of facts are relevant to this petition: the purpose and nature of supermax prisons, the security classification system controlling supermax placements, and the course of proceedings below.

A. The purpose and nature of supermax prisons.

Supermax prisons are a widespread but relatively recent development. The federal government and roughly two-thirds of the states operate such facilities. *Supermax Housing: A Survey of Current Practice* (Nat'l Inst. of Corrs. 1997), at 3. Most have opened since 1990. *Id.* This case concerns Ohio's only supermax prison, the Ohio State Penitentiary ("OSP"), which opened in 1998.

Supermax prisons like OSP are intended to concentrate the most disruptive inmates within a jurisdiction in a single facility in order to make the entire system safer. Such facilities were developed to deal with a "perceived 'toughening' of the inmate population, increased gang activity [and] the difficulty of maintaining order in severely overcrowded prisons." Riveland, *supra*, at 1. Accord *Supermax Housing*, *supra*, at 3 (managing disruptive inmates and coping with gangs identified as the two primary reasons for building supermax prisons).

Although typically only those inmates who have engaged in serious misconduct are placed in such facilities, supermax placement has a preventive rather than punitive goal: averting future problems by segregating disruptive inmates. "Wardens [] invoke this procedure as a preventative . . . measure." Riveland, *supra*, at 5. It is "a non-disciplinary status—that is, the placement is not a penalty with a determinate time affixed to it, but is based on a pattern or history of dangerousness or unconfirmed but reliable evidence of pending disruption." *Id.* at 8.

Not surprisingly, security must be extremely tight in such facilities. Conditions at OSP are typical of those found in other supermax prisons. For example, OSP prisoners are generally held in solitary confinement 23 hours a day and

isolated from other inmates during their time out of their cells. *Supermax Housing*, *supra*, at 4.

The States have always had similar units for isolating problem prisoners, commonly referred to as "administrative segregation" units. Although conditions in such units are essentially the same as in supermax facilities, supermax placements generally last longer than terms in administrative segregation. Riveland, *supra*, at 1–2, 10. The usual stay at OSP is at least a year.

B. Selecting inmates for placement in supermax confinement.

Because of the purpose of supermax facilities—to prevent disruption in prison—the process for deciding which inmates are placed in such facilities is prospectively oriented. A national study of such processes noted that they should focus on "[d]iagnoses, prediction, risk assessment, and identification of causal factors." Riveland, *supra*, at 9. Ohio's does.

As detailed below, OSP placements do not automatically result from particular acts of misconduct. Rather, the placement decisions are based on a wide variety of predictive factors regarding the security risk a prisoner presents, including overall patterns of conduct and the system-wide impact of an inmate's presence in a less restrictive environment. The process for deciding which inmates can be safely released from supermax status is similarly based on predictive assessments. A committee is charged with using its "professional correctional judgment" to "determine whether there has been a diminishing of the inmate's risk to the safety of persons or institutional adjustment" on a periodic basis. ODRC Policy 111-07 § VI(H) & (I), App. 135a–140a.

1. Identifying inmates for transfer to OSP.

All prisoners in Ohio are assigned a rating from Level 1 (lowest risk) to Level 5 (highest risk). This classification is based on a predictive assessment of the likely security risk the prisoner presents based on a variety of characteristics about the prisoner's offense, any previous criminal conduct, his gang affiliation, etc. See ODRC Policy 53-CLS-01 § V, available at http://156.63.250.98; ODRC Policy 111-07 § VI(B)–(D), App. 125a–131a.

A prisoner receives an initial classification upon incarceration, but that classification is subject to change at any point during the prisoner's term, based on his conduct in prison. Prisoners classified at Level 1 through Level 4 are housed in prisons throughout Ohio. Inmates classified (or re-classified) at Level 5, however, are automatically transferred to OSP. Thus, the prisoners' challenge to supermax confinement is in fact a challenge to the procedures for Level 5 classification.

The procedure for classifying inmates as Level 5 is contained in ODRC Policy 111-07, issued January 3, 2002. Under that policy, classification as a Level 5 is triggered by one of two events: (1) an independent finding, in proceedings before the Rules Infraction Board that comply with *Wolff*, that the inmate has committed a serious violation of prison rules, or (2) the inmate's conviction for a new crime committed while in prison. Policy 111-07 § VI(C), App. 127a–130a.

While these events are the triggers, neither automatically results in reclassification. That is, reclassification is not a punishment for the prisoner's misconduct. Rather, if prison officials believe that the prisoner demonstrates an increased risk of future disruption, they prepare a written report that reviews the inmate's

characteristics and conduct more broadly (*i.e.*, age, time remaining on sentence, escape attempts, gang affiliations, history of violence in prison, etc.). Policy 111-07 § VI(C), App. 127a–130a; Security Designation (Long Form), App. 144a. A three-member classification committee then holds a classification hearing (after providing the inmate 48 hours notice) on the reclassification request. The inmate is permitted to make written and oral submissions at the hearing. Policy 111-07 § VI(C), App.127a–130a; Notice of Hearing Form, App. 144a.

Based on the information before it, the committee makes a predictive assessment regarding the inmate's future propensity for disruptive behavior. It then makes a classification recommendation to the Warden that includes a narrative description of "the nature of the threat the inmate presents and the committee's reasons for the recommendation." Policy 111-07 § VI(C), App. 127–130a; Classification Committee Report Form, App. 144a.

If the Warden approves the recommendation, he forwards it to ODRC's Bureau of Classification for final approval. Again, the inmate is provided the opportunity to object. Policy 111-07 § VI(C), App. 127a–130a. If the Bureau approves the recommendation, the prisoner is reclassified at Level 5 and transferred to OSP.

2. Procedures for determining whether an inmate is retained in supermax status.

Ohio also provides significant process when deciding whether a prisoner will stay in supermax. The prisoner's status is reviewed annually. The annual review again focuses on variety of factors that are designed to allow a predictive assessment of the risk the prisoner presents. These factors include the prisoner's underlying criminal offense, the time

left on his sentence, the reasons for his supermax placement, the time that has elapsed since the incident prompting placement, his conduct at OSP, the extent to which he has taken advantage of programming and his interaction with staff. Policy 111-07 § VI(F), (H) & (I), App. 133a–140a; Privilege/Security Level Review Form, App. 144a.

C. The proceedings below.

The plaintiffs here are a class of prisoners who challenged the procedures for deciding which inmates are placed and kept at the security level resulting in supermax confinement. The plaintiffs claim, *inter alia*, that they have a liberty interest in staying out of supermax and that the processes for determining which inmates are placed and kept there are constitutionally inadequate because they fell short of the standards set by *Wolff*.

The district court agreed that, under *Sandin*, the inmates have a state-created liberty interest in avoiding supermax placement. *Austin I*, 189 F. Supp. 2d at 742, App. 96a. The court then turned to the separate question of how much process is due. On this issue, it concluded that the inmates were entitled to at least as much procedural protection as required by *Wolff*. It therefore ordered the State to provide the following additional procedural protections:

- Inmates must be provided "advanced written notice of all the specific evidence" to be considered. Matters not so identified cannot be considered. *Austin I*, 189 F. Supp. 2d at 747, 750, App. 106a, 114a; *Austin II*, 204 F. Supp. 2d at 1026, App. 40a.[1]

[1] The comprehensive notice requirement imposed by the district court "provides inmates appearing before the classification committees with more notice than that received by criminal defendants at trial, where the liberty interests at stake are obviously more substantial." See *Austin*, 372 F.2d at 363 (Rogers, J., concurring in part and dissenting in part), App. 30a.

- Inmates must be allowed to call witnesses, including inmates at other prisons, absent overriding security considerations. *Austin I*, 189 F. Supp. 2d at 747, App. 106a; *Austin II*, 204 F. Supp. 2d at 1026, App. 40a.

- Decisionmakers must provide exhaustive, "detailed and specific justification for [their] decision[s]." *Austin II*, 204 F. Supp. 2d at 1027, App. 42a; *Austin I*, 189 F. Supp. 2d at 753, App. 120a.

The district court also ordered that inmates already in supermax status be told what "specific conduct is necessary . . . to be reduced from [supermax] and the amount of time it will take before" that occurs. *Austin II*, 204 F. Supp. 2d at 1028, App. 44a.

Ohio appealed, challenging the district court's calculation of the process due. The State argued that *Wolff* was not the appropriate benchmark because *Wolff's* procedures were designed to determine specific historical facts. By contrast, the decision whether to place or retain an inmate in supermax status is a subjective, predictive decision based on a wide range of factors. Ohio instead urged the more flexible due process model that this Court adopted for predictive decisions in *Hewitt v. Helms*, 459 U.S. 460 (1983); *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); and *Board of*

Curators v. Horowitz, 435 U.S. 78 (1978), and argued that Policy 111-07 already provided process far beyond that required by *Hewitt*.

The panel rejected Ohio's argument that *Hewitt* provided the appropriate procedural standard. Two judges held that all deprivations significant enough to implicate a liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995), are serious enough to create a presumption that *Wolff*-type procedures are necessary. *Austin*, 372 F.3d at 359–360, App. 23a. "Any liberty interest which passes *Sandin's* threshold comes with a higher presumption of process due." *Id.* at 359 n.12, App. 22a. The panel majority also discounted the significance of the nature (*i.e.*, predictive v. punitive) of the underlying decision: "It is not the nature of the decision which strikes the due process balance; it is the interests on both sides of that balance." *Id.* at 357, App. 18a–19a.

The dissent, by contrast, rejected the notion that *Sandin's* more stringent test for liberty interests should presumptively entitle post-*Sandin* liberty interests to more process. *Id.* at 363 (Rogers, J., concurring in part and dissenting in part), App. 31a. But like the majority, it rejected Ohio's argument that *Hewitt* controlled. It instead called for an independent vetting of Ohio's process under the formula set in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Applying that analysis, it concluded that the requirement that the notice of placement/retention proceedings contain an exhaustive recitation of evidence to be considered was improper because it too heavily burdened the government interest and did not contribute to more accurate decisions. *Austin*, 372 F.3d at 364 (Rogers, J., concurring in part and dissenting in part), App. 32a–34a.

Ohio now asks this Court to grant certiorari to review the Sixth Circuit's judgment that Ohio violated the inmates' due process rights in reclassifying them and transferring them to OSP.

REASONS FOR GRANTING REVIEW

Review is warranted for three reasons. First, the Sixth Circuit's decision exacerbates a clear circuit split regarding what process is due prisoners where prison officials make administrative (i.e., non-punitive) prison placement decisions that deprive a prisoner of a state-created liberty interest in avoiding that placement. Second, the decision below conflicts with this Court's precedents holding that retrospectively focused procedures should not be applied to predictive decisions. Third, the resulting confusion affects thousands of urgent decisions essential to maintaining safety in prisons throughout the nation.

A. The circuits are split over the process due before a prisoner is placed in highly restrictive confinement based on a predictive assessment of security risks.

Although the supermax concept has become more widespread in recent years, the only part of the concept that is actually new is the notion of housing these inmates in a wholly separate facility. States have always kept some of their inmates for long periods of time in supermax-type conditions in some part of their prisons, such as a separate administrative control wing, based on predictive assessments of the threat those prisoners present. Courts have therefore been required to determine what process is due when state regulations create a liberty interest in avoiding placement in those conditions. The circuits have reached conflicting results on this important issue, largely based on confusion about *Sandin*.

The decision below adds to that conflict. Six circuits have addressed the issue, going three different ways. The Third, Eighth, and D.C. Circuits have held, both before and after *Sandin*, that *Hewitt* provides the appropriate benchmark for assessing the quantum of process due when placement is based on a predictive assessment of future behavior. In contrast, the Sixth Circuit, joining the Ninth, has concluded that *Sandin* increased the process due when a liberty interest is found under its more demanding standard. Both of these circuits thus reject *Hewitt* as the benchmark. Finally, adding to the confusion, the Second Circuit has *said* that *Hewitt* controls, but it has actually imposed procedural requirements going well beyond what *Hewitt* requires. Only this Court can provide definitive guidance on this important and frequently recurring issue.

1. The Third, Eighth and D.C. Circuits hold, both before and after *Sandin*, that *Hewitt* controls administrative placement decisions because of the multivariate, predictive nature of the decision.

The Third, Eighth, and D.C. Circuits have rejected prisoners' demands for more extensive process and have instead held that, because of the subjective and predictive nature of the underlying decision, *Hewitt* provides the appropriate benchmark.

The Third Circuit explained why *Hewitt* controls in predictive assessment cases in *Mims v. Shapp*, 744 F.2d 946, 953 (3d Cir. 1984), and reaffirmed that view post-*Sandin* in *Shoats v. Horn*, 213 F.3d 140, 144–146 (3d Cir. 2000). In both cases, prisoners were assigned to conditions every bit as severe as those at OSP, based on security concerns, for periods of five and nine years respectively. *Mims*, 774 F.2d at 948–949; *Shoats*, 213 F.3d at 142–144. In both cases, the court concluded that *Hewitt* provided the due process

framework. As the court explained in *Mims*, in making these administrative placement decisions, prison officials must rely on "'purely subjective evaluations and on predictions of future behavior,'" and such "decision[s] would not be materially assisted by a detailed adversary proceeding.'" 744 F.2d at 950–951 (quoting *Hewitt*, 459 U.S. at 474). Post-*Sandin*, the court reiterated that *Hewitt* controls, explaining that so long as the State provides the "same [procedural] opportunities as those given to the inmate in *Hewitt*," it has given "constitutionally adequate" process. *Shoats*, 213 F.3d at 145.

The D.C. Circuit used identical reasoning to similarly conclude that *Hewitt* controls in administrative segregation cases. The inmates bringing *Brown v. Plaut*, 131 F.3d 163 (D.C. Cir. 1997), and *Crosby-Bey v. District of Columbia*, 786 F.2d 1182 (D.C. Cir. 1986), were held in conditions almost identical to those giving rise to this case for extended periods of time. *Brown*, 131 F.3d at 166; *Crosby-Bey*, 786 F.3d at 1183, 1185. Like these Respondents, those prisoners were placed in those conditions to prevent additional disruption of prison operations. As the court noted in *Crosby-Bey*, however, in making those placement decisions, prison officials are "entitled to rely on 'purely subjective evaluations and on predictions of future behavior.'" *Id.* at 1184 (quoting *Hewitt*, 459 U.S. at 474). Moreover, such decisions are typically based on "general knowledge of prison conditions and tensions," facts that are "peculiarly within the grasp of prison administrators." *Id.* (internal quotations omitted). According to the court, such decisional factors were "singularly unsuited to proof in any highly structured manner," and thus *Hewitt* procedures were appropriate. *Id.* (quoting *Hewitt*, 459 U.S. at 477 n.9) (internal quotations omitted).

The D.C. Circuit relied on *Crosby-Bey* in its post-*Sandin* decision in *Brown* to reach the same conclusion that

Hewitt controls in administrative placement cases. 131 F.3d at 170–171. In doing so, it expressly rejected the prisoner's argument that "because his placement in administrative confinement was based on an express finding that he had assaulted a correctional officer, it was essentially disciplinary in nature, so that he is entitled to the more extensive procedural protections applied to disciplinary hearings in *Wolff*." *Id.* at 170. According to the court, "[p]rison officials may appropriately place an inmate in administrative segregation if she represents a threat to the institution's security," and where they have done so, *Hewitt*, not *Wolff*, provides the appropriate process due. *Id.* (internal quotations omitted).

In the Eighth Circuit, the prisoner-plaintiff in *Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985), spent seven years in "austere and restrictive" confinement that impaired both his ability to earn good time credits and his parole prospects. *Id.* at 228; *Clark v. Brewer*, 578 F. Supp. 1501, 1505, 1508 (S.D. Iowa 1983). In concluding the *Hewitt* was the appropriate benchmark, the Eighth Circuit focused on the many matters to be considered in such decisions: "By necessity, the judgment of penitentiary officials in these types of situations will not be easily measured in objective terms. Instead, their determination must often of necessity be based upon many 'imponderable' factors which necessarily take into account 'purely subjective evaluations and . . . predictions of future behavior.'" *Clark*, 776 F.2d at 235 (quoting *Hewitt*, 459 U.S. at 474) (ellipsis in original). The court noted that "unlike a . . . disciplinary hearing, the determination to be made, while involving a certain amount of objective factfinding, is primarily focused on subjective evaluations and predictions of future behavior. This type of hearing is singularly unsuited for proof in any highly structured manner." *Id.* at 235 (quoting *Hewitt*, 459 U.S. at 477 n.9)

(internal quotations omitted). And, while this was a pre-*Sandin* case, there is no indication that the Eight Circuit has altered that stance after *Sandin*.

Each of those circuits focused on a single dispositive factor: the nature of the decision to be made. Each recognized that, under the general due process framework in *Mathews*, *Hewitt* established appropriate procedures where the prison official's decision being challenged resulted from a forward-looking exercise of subjective judgment based on a wide variety of factors. These circuits also realized that the decisions at issue in those cases—the same type of placement decision giving rise to this case—were predictive, subjective and based on multiple factors. Thus, each concluded that *Hewitt* is the appropriate benchmark.

2. The Sixth and Ninth Circuits hold that *Sandin* requires that *Wolff*, rather than *Hewitt*, controls the "what process is due" question for predictive placement decisions.

In sharp contrast, the Sixth and the Ninth Circuits have concluded that *Hewitt* no longer controls such cases. According to those courts, *Sandin* has changed the standards for determining the process due in prisoner cases. These courts hold that, just as *Sandin* rejected *Hewitt* on the issue of whether a liberty interest exists, so too did *Sandin* reject *Hewitt's* formulation of the process due. In particular, both circuits have required States to hold *Wolff*-type proceedings, rather than informal *Hewitt* hearings, for predictive placement decisions.

Before the decision below, the Ninth Circuit was the sole outlier on this issue. Although it had previously held that *Hewitt* set the standard for equivalent placements, see

Toussaint v. McCarthy, 801 F.2d 1080, 1099–1101 (9th Cir. 1986), it changed direction in *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996).

Keenan arose from an inmate's challenge to the process given him before he was transferred to restrictive conditions to prevent future breaches of prison security. *Id.* at 1087–1088. He claimed a right to call his own witnesses and confront those testifying against him, rights not provided under *Hewitt*. *Id.* at 1088.

Because *Sandin* issued while *Keenan* was on review, the Ninth Circuit remanded to the district court for a new determination of whether Keenan had a liberty interest, and, if so, whether he had received all of the process due. In doing so, however, the Ninth Circuit expressly instructed the lower court that, if it found a liberty interest in the placement, Keenan was entitled to "all of the process he was due under *Wolff*." *Id.* at 1089. While that procedural regimen had been expressly rejected in *Hewitt* as inappropriate for predictive placement decisions, 459 U.S. at 474, the Ninth Circuit reasoned that *Sandin* had revived *Wolff*. In particular, since *Sandin* included statements about returning to the due process principles outlined in *Wolff*, the Ninth Circuit interpreted those statements to mean that full *Wolff* protections were necessary whenever official action deprives a prisoner of a post-*Sandin* liberty interest. *Keenan*, 83 F.3d at 1089. The court did not address, however, the fact that the *Sandin* discussion of *Wolff* took place solely in the context of determining *whether* a liberty interest existed; *Sandin* did not even address, let alone decide, any issues regarding what process is due when such a liberty interest exists. See Pet., *infra*, at 18–19.

The decision below reached the same result through similar, *Sandin*-based, logic. It too read *Sandin* as changing not only the test for determining the existence of a liberty

interest, but also the calculus for determining what process is due if such an interest exists. "*Sandin* called into question not only the mechanistic way in which the circuit courts previously found liberty interests in prison regulations but also the mechanistic fashion in which they" applied pre-*Sandin* precedents on what process is due. *Austin*, 372 F.3d at 357, App. 18a. In particular, the panel majority perceived *Sandin* as requiring two changes.

Most prominently, it held that *Sandin* requires that the private interest factor be given much greater weight in the *Mathews v. Eldridge*, 424 U.S. 319 (1976), calculation for determining the process due. "After *Sandin*, both steps of the analysis—the creation of a liberty interest and the determination of the process due to protect that interest—must carefully reference the severity of the deprivation at stake." *Austin*, 372 F.3d at 357, App. 18a. And under its reading of *Sandin*, "[a]ny liberty interest which passes *Sandin*'s threshold comes with a higher presumption of process due." *Id.* at 359 n.12, App. 22a.

The Sixth Circuit also discounted the relevance of the nature of the underlying decision. "It is not enough to say that a particular decision is 'forward-looking'; instead, reference must be made to the interests at stake, for the inmate and for the state. It is not the nature of the decision which strikes the due process balance; it is the nature of the interests on both sides of that balance." *Id.* at 357, App. 18a–19a.

Consequently, the Sixth Circuit, like the Ninth, required *Wolff*-type proceedings and, indeed, imposed procedural requirements that went beyond *Wolff*. For example, it required prison officials to (1) provide the inmate an "exhaustive list of the reasons to be considered for placement and a summary of the evidence to be presented," (2) allow the inmate to "present witnesses and documentary evidence

at classification hearings," and (3) maintain a record of the proceedings, all procedural requirements that it characterized as "closely track[ing] *Wolff*." *Id.* at 358, App. 20a. Then, going beyond *Wolff*, it also required the prison to make changes to the policy for appealing the classification decision. *Id.*

Hence both the Sixth and Ninth Circuits have held that *Sandin* has trumped *Hewitt's* focus on the nature of the underlying decision. As a result, both circuits have required *Wolff*-type proceedings for predictive placement decisions.

3. The Second Circuit has *said* that *Hewitt* controls, but it has adopted stricter procedural requirements for administrative placements than *Hewitt* compels.

Adding to the confusion, the Second Circuit has stated that *Hewitt* controls, but it has actually required greater process than *Hewitt* compels. In *Taylor v. Rodriguez*, 238 F.3d 188 (2d Cir. 2001), a prisoner was placed in very restrictive confinement for more than two years because his involvement with a prison gang was perceived to be an ongoing threat to security. *Id.* at 190. That action was presumed to implicate a liberty interest under *Sandin*, and thus the court faced the "what process is due" question. The court *said* that for challenges to placements predicated on administrative (as opposed to punitive) reasons, all that is necessary is "'some notice of the charges against [the prisoner] and an opportunity [for him] to present his views to the prison official charged with deciding whether to transfer him to administrative segregation.'" *Id.* at 192 (quoting *Hewitt*, 459 U.S. at 476).

But, in addressing the details of what was required, the court expressly adopted the more elaborate notice standard announced in *Wolff*. *Id.* ("Case law has not expressly set out

what is to be included in a notice with respect to administrative segregation, but since such standards have been articulated with respect to disciplinary segregation [in *Wolff*], we see no reason to establish separate standards for each."). Thus, in administrative segregation cases, the Second Circuit seems to straddle the fence.[2]

* * *

In sum, the decision below deepens an existing circuit split over what process is due before a prisoner is placed in supermax-type conditions for preventive reasons. Three circuits hold, both before and after *Sandin*, that *Hewitt* controls because of the great similarity between its prospective focus and the predictive nature of supermax placements. Two circuits hold that *Sandin* trumps that approach. One circuit is somewhere in the middle. Those disparate approaches cannot be reconciled, and only this Court can determine which is correct.

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[2] In prison liberty interests contexts other than the administrative segregation context, the Second Circuit has adopted the position advocated by the Third, Eighth, and D.C. Circuits (and the position we urge here). Namely, "the procedures required by *Wolff* apply if the restraint on liberty is imposed for disciplinary reasons; if the restraint is for 'administrative' purposes, the minimal procedures outlined in *Hewitt* are all that is required." *Benjamin v. Fraser*, 264 F.3d 175, 190 (2d Cir. 2001) (citing *Soto v. Walker*, 44 F.3d 169, 172 & n.3 (2d Cir. 1995)); see also *Matiyn v. Henderson*, 841 F.2d 31, 34 (2d Cir. 1988).

B. The Sixth Circuit's decision conflicts with this Court's precedents on the process due when state action implicates a prisoner's liberty interest.

In addition to exacerbating the confusion among the Circuits, the decision below also warrants certiorari for another reason; it contradicts this Court's holdings in two respects. First, it reads too much into *Sandin* and its impact on *Hewitt*. Second, it gives too little consideration to the nature of the decisions giving rise to this case, thereby conflicting with *Hewitt*'s holding regarding the process due for predictive decisions, a holding that remains intact even after *Sandin*.

1. The Sixth Circuit erred in concluding that *Sandin v. Connor* changed the process due prisoners deprived of liberty interests.

Nothing in *Sandin* supports the Sixth Circuit's conclusion that that decision "called into question . . . [the] fashion in which [courts] applied the *Hewitt/Wolff* dichotomy" for determining the process due a prisoner. *Austin*, 372 F.3d at 357, App. 18a. *Sandin* expressly stated that it did not overturn either *Wolff* or *Hewitt* on the issue of how much process is due, and none of this Court's other precedents suggest that *Sandin* should be so interpreted.

In fact, *Sandin* tells us nothing about the amount of process due a prisoner deprived of a state-created liberty interest. The question presented there dealt exclusively with the *existence* of a liberty interest and therefore did not encompass questions about the procedures required when such an interest exists. *Sandin*, 515 U.S. at 474; see also 1993 U.S. Briefs 1911 (Lexis/Nexis). It is not surprising, then, that the opinion made only passing reference to prior decisions about the process due in the face of a liberty interest, *Sandin*, 515 U.S at 478–479, and expressly stated that it was *not* overruling any prior case, *id.* at 483 n.5.

No subsequent decision of this Court casts *Sandin* in that light. *Sandin* has been cited five times, but none of those references had anything to do with the process due a prisoner deprived of a liberty interest. See *Overton v. Bazzetta*, 539 U.S. 126, 137 (2003); *McKune v. Lile*, 536 U.S. 24, 36, 37 (2002); *id.* at 54 (O'Connor, J. concurring); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 278, 283 (1998); *Young v. Harper*, 520 U.S. 143, 148 (1997); *Lewis v. Casey*, 518 U.S. 343, 352 (1996); *id.* at 385 (Thomas, J. concurring). The Sixth Circuit was simply wrong to read so much into *Sandin*.

2. The decision below conflicts with this Court's holdings that require a focus on the prospective or retrospective nature of the decision in deciding what type of process is due.

The Sixth Circuit's holding that "[i]t is not the nature of the decision which strikes the due process balance," *Austin*, 372 F.3d at 357, App. 18a–19a, flies in the face of multiple precedents establishing that the type of elaborate procedures ordered here simply do not work when officials must make subjective, predictive decisions based on a multiple factors.

This Court has repeatedly declared that the nature of the underlying decision is a key factor in the Due Process equation. In fact, *Mathews v. Eldridge*, the seminal case in this area, called it "[c]entral to the evaluation of any administrative process." 424 U.S. at 343. Of particular import here, the Court has consistently distinguished between retrospective, fact-specific decisions and predictive, subjective decisions that are based on multiple factors. The Court has repeatedly concluded that procedures appropriate to the former are ill-suited for the latter.

That functional distinction plainly appears in *Board of Curators v. Horowitz*, 435 U.S. 78 (1978). There, the Court faced a due process challenge to an administrative decision expelling a student from public school on academic grounds. The Court expressly differentiated decisions "rest[ing] on factual conclusions that [] individual students had participated" in specific acts of misconduct, from "subjective and evaluative" decisions about prospects for future success, decisions that "rested on the academic judgment of school officials." *Id.* at 89–90. It noted that "the determination whether to dismiss a student for academic reasons requires . . . evaluation of *cumulative* information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90 (emphasis added); see also *id.* at 91 n.6 ("[T]he school considers and weighs a variety of factors, not all of which, as noted earlier, are adaptable to the factfinding hearing."). The Court thus rejected procedures focused on finding historical facts about specific actions as counterproductive because "evaluations, which go far beyond questions of mere 'conduct,' are not susceptible of the same sorts of procedural safeguards that are appropriate to determining facts relating to misconduct." *Id.* at 95 n.5 (Powell, J., concurring).

Importantly, the Court has consistently made that same distinction in prison cases. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), rejected a call for *Wolff*-type procedures in parole hearings because "experience has shown, that the parole-release decision is . . . essentially an experienced prediction based on a host of variables," *id.* at 16, one that is "necessarily subjective in part and predictive in part," *id.* at 13, requiring consideration of what "the entire record shows," *id.* at 15. The Court therefore concluded that "[p]rocedures designed to elicit specific facts . . . are not necessarily appropriate." *Id.* at 14.

Meachum v. Fano, 427 U.S. 215 (1976), similarly rejected the contention that transfers made in response to disruptive conduct required *Wolff*-type hearings. According to the Court, such transfers are "made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security." *Id.* at 225.

Bringing the matter into even sharper focus, *Hewitt*, held that the very type of decision at issue here—a placement decision designed to limit problems related to a disruptive prisoner—is not aided by fact-specific procedures. In rejecting such procedures, the Court first noted the predictive nature of the decision: "The judgment of prison officials in this context . . . turns largely on purely subjective evaluations and on predictions of future behavior. 459 U.S. at 474 (emphasis added; internal quotations omitted). It also noted the many variables in the decision process: "[A]dministrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like," requiring officials to "predict not just one inmate's future actions . . . but those of an entire institution." *Id.*

The Sixth Circuit's decision cannot be reconciled with those precedents. The nature of a supermax placement decision is identical to the decision at issue in *Hewitt*. It requires "[d]iagnoses, prediction, risk assessment, and identification of causal factors" that "often defy objective criteria." Riveland, *supra*, at 9. But the panel majority gave that factor no consideration, and instead required procedures designed to determine different types of facts.

That approach simply does not work. Requiring *Wolff*-type procedures for those decisions degrades security for all who must live and work in Ohio's prisons. Review is urgently needed to address that harm.

C. The circuit split on this issue has significant consequences for day-to-day prison operations.

This case presents more that an abstract doctrinal dispute. The positions taken by the Sixth, Second and Ninth Circuits put States in those circuits in an untenable position—everyday.

The States have an Eighth Amendment, and humane, duty to take affirmative action to neutralize the threats posed by dangerous inmates. But the ill-suited procedural requirements imposed by courts in these circuits make it very difficult, if not impossible, to meet that duty.

Nor is this an isolated problem. The types of decisions at issue here—determining which inmates must be separated from the general prison population to reduce violence—must be made thousands of times each year. *The Corrections Yearbook: Adult Corrections 2002* (Criminal Justice Inst., Inc. 2003) 46 (23,252 prisoners held in administrative segregation during 2001). And precedents from the Sixth, Second and Ninth Circuits have an inordinate impact on the nation's prisons. Those circuits contain almost half of the country's supermax beds, 37 percent of the nation's state prisoners, and 25 percent of all federal prisoners. *Supermax Housing*, *supra*, at 4 table 1; *Prison and Jail Inmates at Midyear 2003* (Bureau of Justice Statistics 2004), at 3 table 2; *Federal Bureau of Prisons Weekly Population Report* (September 30, 2004), available at http://www.bop.gov.

In short, the question presented here has significant safety implications for tens of thousands of state prisoners.

This Court should accept certiorari to vindicate the States' ability to meet these legitimate prison security concerns.

CONCLUSION

For the above reasons, the Petition should be granted.

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